

HOUSE No. 02165

The Commonwealth of Massachusetts

PRESENTED BY:

John V. Fernandes

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act to provide access to scientific and forensic analysis.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>John V. Fernandes</i>	<i>10th Worcester</i>
<i>William N. Brownsberger</i>	<i>24th Middlesex</i>
<i>Jason M. Lewis</i>	<i>31st Middlesex</i>

HOUSE No. 02165

By Mr. Fernandes of Milford, a petition (accompanied by bill, House, No. 2165) of John V. Fernandes, William N. Brownsberger and Jason M. Lewis relative to providing access to scientific and forensic analysis. The Judiciary.

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

An Act to provide access to scientific and forensic analysis.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Legislative Findings

2 The general court hereby finds that (1) forensic and scientific techniques are often used to
3 analyze evidence or biological material obtained during the investigation of a crime, and, as
4 these techniques become more accurate, their use can, in some cases, conclusively establish a
5 person’s guilt or innocence, or otherwise provide significant probative evidence; (2) as these
6 techniques have improved, they have allowed analyses of earlier obtained evidence or biological
7 materials; (3) in some circumstances, modern techniques can be used to demonstrate that a
8 conviction that predates the development of such techniques was based on incorrect factual
9 findings, and these forensic and scientific techniques provide a more reliable basis for
10 establishing a factually correct verdict than the evidence available at the time of the original
11 conviction; (4) in recent years, there have been a significant number of exonerations based on the

12 results of newly developed forensic and scientific techniques; (5) the purpose of this chapter is to
13 remedy the injustice of wrongful convictions of factually innocent persons by allowing access to
14 analyses of biological material with newer forensic and scientific techniques.

15

16 SECTION 2. The General Laws are hereby amended by adding

17 the following new chapter:—

18

19 Chapter 278A. Post Conviction Access to Forensic and Scientific Analysis.

20

21 § 1. Definitions.

22 As used in this chapter, the following words shall have the following meanings, unless the
23 context clearly requires otherwise:—

24

25 “Analysis” shall mean the process by which a forensic or scientific technique is applied to
26 evidence or biological material to identify the perpetrator of a crime.

27 “Conviction” shall mean any verdict or finding of guilty, a plea of guilty, or a plea of nolo
28 contendere, entered by the trial court.

29 “Criminal offender databases” shall include: the State DNA Database, G. L. c. 22E; the Sex
30 Offender Registry, G. L. c. 6, §§ 178C-N; and the Criminal Offender Record Information
31 System, G. L. c. 6, § 168-178A.

32 “Factually innocent” shall describe a person convicted of a criminal offense who did not commit
33 that offense.

34 “Governmental entity” shall mean any official body of the commonwealth, or of any county,
35 city, or town within the commonwealth.

36 “Inventory” shall mean a detailed listing, including a particularized description of each listed
37 item.

38 “Moving party” shall mean a person who files a motion pursuant to this Chapter. “Post
39 conviction” shall indicate any time after which a conviction has been entered.

40 “Prosecuting attorney” shall mean the District Attorney for the district in which the moving party
41 was convicted, or the Attorney General of the commonwealth.

42 “Replicate analysis” shall mean the duplication of an analysis performed on a particular item of
43 evidence or biological material.

44 “Underlying case” shall mean the trial court proceedings that resulted in the conviction of the
45 moving party.

46 “Victim” shall mean any natural person who suffered direct or threatened physical, emotional, or
47 financial harm as the result of the commission or attempted commission of the crime that is the
48 subject of the underlying case, and shall also include the parent, guardian, legal representative, or

49 administrator or executor of the estate of such person if that person is a minor, incompetent, or
50 deceased.

51 “Victim and witness assistance board” shall mean the entity established by G. L. c. 258B, § 4.

52

53 § 2. Applicability.

54 Any person who has been convicted of a criminal offense in a court of the commonwealth, and is
55 in custody or whose liberty is restrained as the result of that conviction, and asserts that he is
56 factually innocent of that criminal offense, may file a motion for forensic or scientific analysis
57 pursuant to this Chapter. The procedures set forth in this chapter shall not be construed to
58 prohibit the performance of forensic or scientific analysis under any other circumstances,
59 including by agreement between the person convicted of a criminal offense and the prosecuting
60 attorney.

61

62 § 3. Requirements and procedures for filing.

63 (a) A person seeking relief pursuant to this Chapter shall file a motion in the court in which the
64 conviction was entered, using the same caption and docket number as identified the underlying
65 case.

66 (b) The motion shall include the following information, and when relevant, shall include specific
67 references to the record in the underlying case, or to affidavits that are filed in support of the
68 motion that are signed by a person with personal knowledge of the factual basis of the motion:

69 (1) The name and a description of the requested forensic or scientific analysis; and

70 (2) Information demonstrating that the requested analysis is admissible as evidence in courts of
71 the commonwealth; and

72 (3) A description of the evidence or biological material on which the analysis may be conducted,
73 including its location and chain of custody if known, and

74 (4) Information demonstrating that the analysis has the potential to result in evidence that is
75 material to the moving party's identification as the perpetrator of the crime in the underlying
76 case; and

77 (5) Information demonstrating that the evidence or biological material has not been subjected to
78 the requested analysis because:

79 1. The requested analysis had not yet been developed at the time of the conviction; or

80 2. The results of the requested analysis were not admissible in courts of the commonwealth at the
81 time of the conviction; or

82 3. The moving party and his attorney were not aware of and did not have reason to be aware of
83 the existence of the evidence or biological material at the time of the underlying case and
84 conviction; or

85 4. The moving party's attorney in the underlying case was aware at the time of the conviction of
86 the existence of the evidence or biological material, the results of the requested analysis were
87 admissible as evidence in courts of the commonwealth, and a reasonably effective attorney
88 would have sought the analysis; or

89 5. The evidence or biological material was otherwise unavailable at the time of the conviction.

90 (c) If the moving party is unable to include for filing with the motion any of the items or
91 information described in subsection (b), or if the moving party lacks items or information
92 necessary to establish any of the factors listed in section 7(b), the moving party shall include a
93 description of efforts made to obtain such items and information and may move for discovery of
94 such items or information from the prosecuting attorney or any third party

95 (d) The moving party shall file with the motion an affidavit stating that he or she is factually
96 innocent of the offense of conviction and that the requested forensic or scientific analysis will
97 support the claim of innocence. A person who pleaded guilty or nolo contendere in the
98 underlying case may file a motion under this Chapter. A judge shall not find that identity was not
99 or could not have been a material issue in the underlying case because of the plea. A person who
100 is alleged to have, or admits to having, made a statement that is or could be incriminating may
101 file a motion under this Chapter. A judge shall not find that identity was not or should not have
102 been a material issue in the underlying case because the moving party made, or is alleged to have
103 made, an incriminating statement. If the moving party entered a plea of guilty or nolo contendere
104 to the offense of conviction or made an incriminating statement, the moving party shall state in
105 the affidavit that the claim of actual innocence is not made notwithstanding the plea or
106 incriminating statement.

107 (e) The court may deny, without prejudice, any motion which fails to include all the information
108 required by this Section.

109

110 § 4. Service of process and response to motion.

111 (a) The moving party shall file the motion with the court which adjudicated the underlying case
112 and shall serve a copy of the motion on the prosecuting attorney.

113 (b) The prosecuting attorney shall have 60 days to file a response with the court and shall
114 simultaneously serve the response on the moving party. The prosecuting attorney may request
115 enlargements of time in which to file the response, which the court may allow for good cause
116 shown.

117 (c) The prosecuting attorney's response shall include any specific legal or factual objections that
118 the prosecuting attorney has to the requested analysis.

119

120 § 5. Appointment of counsel.

121 The judge in his discretion may assign or appoint counsel to represent a moving party in the
122 preparation and presentation of motions filed under this Chapter.

123

124 § 6. Hearing.

125 (a) The court shall order a hearing on the motion if it conforms with the requirements of §3.

126 (b) The judge who conducted the trial or accepted the moving party's plea of guilty or nolo
127 contendere in the underlying case shall conduct the hearing if possible.

128 (c) The moving party may file a motion requesting that he be present at the hearing on the
129 motion. If the judge allows such a motion, the judge shall order the commonwealth to produce
130 the moving party at the hearing.

131

132 § 7. Ruling on the Motion.

133 (a) The judge shall state findings of fact and conclusions of law on the record, or shall make
134 written findings of fact and conclusions of law, that support the decision to allow or deny a
135 motion brought under this Chapter.

136 (b) The judge shall allow the requested forensic or scientific analysis if each of the following has
137 been demonstrated by a preponderance of the evidence:

138 (1) that the evidence or biological material exists;

139 (2) that the evidence or biological material has been subject to a chain of custody that is
140 sufficient to establish that it has not deteriorated, been substituted, tampered with, replaced,
141 handled or altered such that the results of the requested analysis would lack any probative value;

142 (3) that the evidence or biological material has not been subjected to the requested analysis;

143 (4) that the requested analysis has the potential to result in evidence that is material to the
144 moving party's identification as the perpetrator of the crime in the underlying case;

145 (5) that the purpose of the motion is not the obstruction of justice or delay; and

146 (6) that the results of the particular type of analysis being requested have been found to be
147 admissible in courts of the commonwealth.

148 (c) The judge on motion of any party, after notice to the opposing party and an opportunity to be
149 heard, may authorize such discovery from the prosecuting attorney or any third party as is
150 deemed appropriate, subject to appropriate protective orders or an order to the moving party to

151 produce reciprocal discovery. If, in response to a motion made under section 3(c), the court
152 finds good cause for the moving party's inability to obtain items or information required under
153 sections 3(b) and 7(b), the court may order discovery, consistent with Rules 14 and 17 of the
154 Massachusetts Rules of Criminal Procedure, to assist the moving party in identifying the location
155 and condition of evidence or biological material that was obtained in relation to the underlying
156 case, regardless of whether it was introduced at trial or would be admissible.

157

158 § 8. Laboratory.

159 (a) In allowing a motion under this Chapter, the judge shall specify conditions on the analysis,
160 including, but not limited to, the transportation, handling, and return of evidence or biological
161 materials, to protect the integrity of the evidence or biological material and the analysis.

162 (b) The prosecuting attorney and the moving party shall agree on a forensic services provider to
163 conduct the analysis, which may include the department of state police or city of Boston forensic
164 services units.

165 (c) If the prosecuting attorney and the moving party are unable to agree on a forensic services
166 provider, the judge shall designate a provider that is accredited by the American Society of
167 Crime Laboratory Directors Laboratory Accreditation Board and has the capability to perform
168 the requested analysis. For purposes of this section, "laboratory" shall refer to the forensic
169 services provider selected under paragraph (b) or (c).

170 (e) The laboratory shall give equal access to its personnel, opinions, conclusions, reports, and
171 other documentation to the prosecuting attorney and the moving party.

172 (f) The laboratory shall endeavor to retain and maintain the integrity of a sufficient portion of the
173 evidence or biological material for replicate analysis. If, after initial examination of the evidence
174 or biological material, but before the actual analysis, the laboratory determines that there is
175 insufficient material for replicate analysis, it shall simultaneously notify in writing the
176 prosecuting attorney, the moving party, and the judge. Exhaustive testing shall not occur without
177 written authorization by both the moving party and the prosecuting attorney. In the event that
178 exhaustive testing is so authorized, upon request of either party, the judge shall make such orders
179 to ensure that representatives of the moving party and the prosecuting attorney have the
180 opportunity to observe the analysis, unless such observation is inconsistent with the practices or
181 protocols of the laboratory conducting the analysis.

182 (g) The moving party shall cooperate with the laboratory. At the laboratory's or the prosecuting
183 attorney's request and upon court order, the moving party shall provide biological samples to the
184 laboratory or to law enforcement personnel. If the moving party unreasonably fails to cooperate
185 with such orders, the judge may deny the motion with prejudice.

186

187 § 9. Timeliness of analysis.

188 Upon allowance of a motion under this Chapter, analysis shall take place as soon as practicable.

189

190 § 10. Costs.

191 The costs of the analysis shall be paid:

192 (a) by the moving party if the moving party is not indigent and has sufficient means to make such
193 payment; or (b) if the moving party is indigent, as an extra fee or cost under the provisions of
194 sections 27A through 27G of chapter 261; or (c) by the moving party and as an extra fee or cost
195 in shares as the court deems equitable.

196

197 § 11. Effect on other proceedings.

198 (a) If an appeal of the conviction or other post-conviction proceedings in the underlying case are
199 pending, the moving party shall file a motion to stay such proceedings and for leave to file a
200 motion under this chapter, which shall be liberally granted.

201 (b) Proceedings pursuant to this chapter shall not stay or otherwise interfere with a term of
202 incarceration, parole, probation, or other sentence imposed.

203

204 § 12. Disclosure of results of analysis.

205 (a) The results of the analysis shall be simultaneously disclosed to the moving party, the
206 prosecuting attorney, and the judge.

207 (b) At the request of any party, or on its own initiative, the judge shall order production of the
208 underlying laboratory data, documents, and notes.

209

210 § 13. Further proceedings following analysis.

211 If the analysis is inconclusive, the court may order any additional analysis requested if the court
212 concludes that the requirements of section 7(b) are met.

213 §14. Notice to victims.

214 (a) If a motion is filed under this Chapter, the prosecuting attorney may notify the victim of the
215 crime in the underlying case.

216 (b) The prosecuting attorney may, in his or her discretion, notify the victim if the court allows a
217 motion for forensic or scientific analysis and, if the victim is notified of the allowance of the
218 motion, shall promptly notify the victim of the result of the analysis.

219

220 § 15. Waiver of rights.

221 The right to file a motion pursuant to this Chapter shall not be waived. This prohibition of any
222 waiver includes, but is not limited to, any stated or unstated waiver that is or is alleged to be part
223 of any agreement or understanding related to any plea of guilty or of nolo contendere or to any
224 sentencing or appellate proceeding or to any correctional placement or conditions.

225

226 § 16. Preservation of evidence and biological material.

227 (a) Any governmental entity that is in possession of biological evidence that is collected for its
228 potential evidentiary value during the investigation of a crime, the prosecution of which results
229 in a conviction, shall retain such biological evidence for the period of time that any person
230 remains in the custody of the commonwealth or under parole or probation supervision in

231 connection with that crime, without regard to whether the biological evidence was introduced at
232 trial. Each governmental entity shall retain all such biological evidence in a manner that is
233 reasonably designed to preserve the evidence and biological material and to prevent its
234 destruction or deterioration. Such biological evidence need not be preserved if it must be
235 returned to a third party or if it is of such a size, bulk, or physical character as to render retention
236 impracticable.

237 (b) The Secretary of Public Safety and Security, in consultation with the Forensic Sciences
238 Advisory Board, shall promulgate regulations governing the retention and preservation of
239 biological evidence by any governmental entity, which regulations shall include standards for
240 maintaining the integrity of the materials over time, the designation of officials at each
241 governmental entity with custodial responsibility, and requirements of contemporaneously
242 recorded documentation of individuals having and obtaining custody of any biological evidence.

243 (c) For the purposes of this section, the term “biological evidence” means a sexual assault
244 forensic examination kit or semen, blood, saliva, hair, skin tissue, or other identified biological
245 material.

246

247 § 17. Liability.

248 (a) Governmental officials and employees acting in good faith shall not be liable in a civil or
249 criminal proceeding for any act or pursuant to the provisions of this chapter.

250 (b) If a governmental entity responsible for the preservation of evidence or biological material
251 engages in willful or wanton misconduct or gross negligence which results in the deterioration or

252 destruction of evidence or biological material so that a laboratory is unable to perform adequate
253 or proper analysis, that entity shall be subject to proceedings for contempt.

254 (c) Nothing in this chapter shall create any cause of action for damages against the
255 commonwealth or any of its subdivisions or officers, employees, agents, or subdivisions, except
256 as provided in this Section.

257

258 § 18. Appeal.

259 An order allowing or denying a motion for forensic or scientific analysis filed under this Chapter
260 is a final and appealable order. Any appeal from such an order shall be claimed by filing a notice
261 of appeal within 30 days of the court's entry of the written order upon the docket.